

7/11/05

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA

In re

Case No. 03-11967-DHW
Chapter 7

JERRY J. CREEL and
MARTHA R. CREEL,

Debtors.

ORDER ON JOINT MOTION
FOR RECONSIDERATION

On October 13, 2005 the chapter 7 trustee and his counsel filed a joint motion to reconsider this court's order of October 4, 2005 partially approving the application for compensation of trustee's counsel.

Procedural and Factual Background

Ordinarily, an application to employ a professional person to represent the estate is approved without a hearing provided the bankruptcy administrator recommends the employment. However, an employment application will be set for hearing if the court questions the employment or the employment terms.

Such was the case here. The trustee filed an application to employ counsel on a one-third contingency basis to represent the estate in litigation involving two decedent estates. The bankruptcy administrator recommended the employment.

Nevertheless, because the court was concerned about the reasonableness of the compensation arrangement, the application was set for hearing on January 14, 2004.

Trustee's counsel appeared at the hearing. The court and counsel engaged in a colloquy during which the court made known to counsel a

number of concerns over counsel's employment on a contingency basis in a decedent estate setting. At the conclusion of the hearing, the court was assured by counsel that the fee would be reasonable.

An order dated January 15, 2004 entered authorizing the employment but expressly providing that "the court reserves the right to fix reasonable compensation for such services upon application by counsel." See Order Granting Trustee's Application To Employ Professional Person (Doc. # 33, January 15, 2004).

Counsel, however, did not maintain contemporaneous time records in connection with his representation of the trustee.

Discussion and Conclusions

With court approval a trustee may employ an attorney to represent the estate for a specified special purpose. The statute provides:

(e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

11 U.S.C. §327(e).¹

Limitation on the compensation of professional persons, however, is the subject of 11 U.S.C. § 328, which provides, in part:

¹ Trustee's counsel is a member of the same law firm as counsel for the debtors.

(a) The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, or an hourly basis, or on a contingent fee basis. **Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.**

11 U.S.C. § 328(a) (emphasis added).

Finally, 11 U.S.C. § 330 authorizes the court to award only reasonable fees to professional persons following notice and a hearing. The section provides in relevant part:

(a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103 —

(A) **reasonable compensation** for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, **award compensation that is less**

than the amount of compensation that is requested.

(3) In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and

(E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

11 U.S.C. § 330(a)(1) through (3) (emphasis added).

A contingency fee arrangement for representation in connection with a decedent estate matter has from the outset been problematic for the court. The court is satisfied that trustee's counsel was aware of this concern, either from comments made at the January 14, 2004 hearing or from the court's January 15, 2004 order expressly reserving the right to award a reasonable fee following an application.

However, contemporaneous time records were not maintained. Without these records, the court is deprived of the most relevant factor in determining a reasonable fee.²

² The court does not dispute that counsel for the trustee rendered valuable services that were beneficial to the estate and performed in a

For this reason and for the reasons set forth in the court's order dated October 4, 2005, the joint motion to reconsider is DENIED.

Done this the 1st day of November, 2005.

/s/ Dwight H. Williams, Jr.
United States Bankruptcy Judge

professional manner.